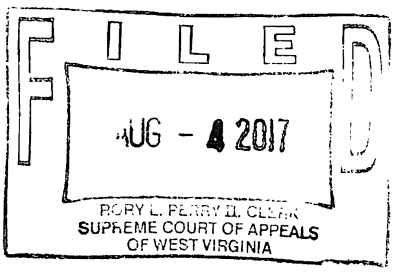

SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRI L. SMITH and KENNETH W. SMITH,	:	
Plaintiffs Below, Petitioners,	:	206
	:	Case No. 17-0806
v.	:	(Ohio County Civil Action No. 13-C-323)
	:	
ROBERT TODD GEBHARDT, MICHAEL	:	
COYNE, and TRIPLE S&D, INC.,	:	
Defendants Below, Respondents.	:	

RESPONDENT MICHAEL COYNE AND TRIPLE S&D, INC.'S RESPONSE TO PETITIONERS APPEAL BRIEF

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I. STATEMENT OF THE CASE

a. Procedural History

Petitioners filed their complaint against Robert Todd Gebhardt, Lumber Liquidators, LLC, and "John Doe and John Doe Contracting," on September 7, 2013. Appx. Vol. 1, p. 129. Petitioner filed an amended complaint on August 20, 2014 to add a West Virginia Consumer Credit Protection Act ("WVCCPA") claim, and again on December 18, 2014 to add Respondents Michael Coyne and Triple S&D. Appx. Vol. 1, p. 129 and 397, respectively. Respondent Coyne and Triple S&D cross-claimed against the other Respondents. Appx. Vol. 1, p. 496.

On September 21, 2015, Respondent Gebhardt filed Motions *in Limine* and for sanctions regarding the testimony of Petitioner's Experts Martin Maness, Alan Baker, John Gongola, Joshua Emery, Fred Casale, Louis Costanzo, and Richard Derrow. Appx. Vol. 1, pp. 720, 736, 750, 760, 768, 772, and 784, respectively. Respondent Gebhardt also filed a separate Motion to Strike Plaintiff's Expert Jake Lamott, as well as Motions for Summary Judgment on Plaintiff's Comparative Negligence, Punitive Damages, WVCCPA, Intentional Interference with Warranty Contracts, Failure to Mitigate Damages, Water Intrusion, and Fraud. Appx. Vol. 1 at 791, 820, 1001, 1006, 1015, 1022, 1029, and 1038, respectively. Finally, Gebhardt filed an Omnibus Motion *in Limine* primarily dealing with the exclusion of evidence and testimony. Appx. Vol. 1 at 795.

Also on September 21, 2015, Respondent Coyne filed twelve (12) motions relevant to this appeal with the trial court – a Motion to Preclude the Presentation of Evidence Relating to the "Water Test, a Motion *in Limine* Regarding Spoliation of Evidence, Motions *in Limine* joining Respondent Gebhardt's Motions *in Limine* with regard to Alan Baker, Martin Maness, Fred Casale, Joshua Emery, John Gongola, and Motions joining Respondent Gebhardt's Motions for Summary Judgment on Failure to Mitigate Damages, Comparative Negligence, Punitive Damages, as well

as a separate Motion to Strike Plaintiff's Witness John Gongola. Appx. Vol. 1, pp. 597, 602, 608, 612, 616, 620, 624, 627, 630, and 633, respectively.

Following the first Pre-Trial Conference on October 16, 2015, the trial court granted Summary Judgment to Respondents on Petitioners' claims for Punitive Damages, Fraud and Fraudulent Inducement, WVCCPA claims, and Intentional Interference with Contractual Relations. Appx. Vol. 1, pp. 54, 58, 71, and 77, respectively. The lower court also issued a series of orders precluding Petitioners' experts from testifying to various issues based on their deposition testimony. *See* Appx. Vol. 1, pp. 85, 87, 89, 92, 102, and 114. Respondent Coyne filed a Motion for Summary Judgment. Appx. Vol. 2, p. 1807.

A second Pre-Trial Conference was held on November 4, 2016, where the court warned Petitioners about their continual failures to give notice to the opposing party. Appx. Vol. 2, p. 2235-2270.

Four days later, on November 8, 2016, Petitioners served Respondent Gebhardt with a trial subpoena demanding that he produce information not previously produced through the years the case was pending at the first day of trial. Appx. Vol. 2, p. 1925. Petitioners did not notify Respondents of the subpoena. On November 9, 2016, Respondent Gebhardt filed a Motion to Dismiss based on Petitioners' litigation misconduct. Appx. Vol. 1, p. 1864. The lower court scheduled an evidentiary hearing on November 15, 2016. Appx. Vol. 2, p. 2278. After obviously careful consideration and significant research, the lower court granted Respondents' Motion to Dismiss in a twenty-seven page motion on February 3, 2017. Appx. Vol. 1, pp. 1-27.

b. Statement of Facts

Petitioners contracted with Respondent Gebhardt to build a home for them at an approximate cost of $201,400.00. Appx. Vol. 1, p. 149-152. Respondent Coyne and Triple S&D

were sub-contractors to Gebhardt. Their only job pertaining to the home was to install a decorative brick veneer around the home for a few thousand dollars. Petitioners alleged that water seeping through the brick was causing the home of the basement to flood. Appx. Vol. 1, 441-481. After the basement allegedly began to leak water, and Gebhardt's repeated good-faith efforts to repair the water did not solve the problem, Petitioners' counsel threatened Gebhardt with litigation if the problem was not solved. Appx. Vol. 1, p. 300-302; Pet'rs' Brief, p. 3-4. Once litigation was likely, Petitioners then met Gebhardt at their home about the walls, where their counsel surreptitiously recorded the conversation with Gebhardt in order to gain an advantage during the litigation that he and Petitioners were likely to commence. Appx. Vol. 6, p. 6854. Petitioners commenced said litigation, filing their complaint on September 27, 2013.

During the leadup to, or during the course of litigation, Petitioners engaged in a series of actions that unquestionably spoliated evidence. All of these events took place without notice to Respondents and without an opportunity to witness the following acts:

Petitioners had an expert paint orange lines over all the walls, which defaced the appearance of the wall. Petitioners removed bricks from the wall, compromising the building envelope and water barrier. Petitioners watered the foundation, which caused water damage to the walls. Petitioners placed a screen over the away drain[1], slowing the water exiting the foundation and likely causing water intrusion. They then removed that blockage, forever damaging Respondents' ability to view the result of the drain being removed. Petitioners disassembled the mounting plate for the bannister on the concrete floor, after which they claimed to have found water under the basement slab. Finally, Petitioners performed mold tests on the walls without

[1] The parties have referred to the discharge point for the French drain and basement drains as an "away drain." A picture of the blocked "away drain" can be found at Appx. Vol. 5202.

Respondents present.[2] As above, Respondents were not in attendance for any of the above, nor were they given any notice. *See, e.g.*, Pet'rs' Brief, pp. 15-31, Appx. Vol. 1, Order Granting Motion to Dismiss, pp. 6-12, Coyne Motion *in Limine* RE: Spoliation of Evidence, p. 602.

Petitioners also disclosed numerous experts who did not actually testify to the opinions they were alleged to offer. The lower court found that Martin Maness had thirteen (13) of his twenty-two (22) opinions excluded after he disclaimed most of them during cross-examination and lacked expertise for the other opinions. Appx. Vol. 1, p. 12. Richard Derrow, who was supposed to testify about the cost of replacing the floor, admitted that he quoted a price for a totally different custom floor. Appx. Vol. 1, p. 13. Josh Emery, allegedly Petitioners' waterproofing expert, explained in his deposition he quoted Petitioners a price of $16,956.00, which he guaranteed. Petitioners refused this and asked for a second, more involved, proposal, which he gave at a price of $44,114.00, without guarantees. Appx. Vol. 3, p. 3523-3524.

John Gongola, an alleged "mold remediation expert," offered an estimated cost for remediation divined through either wizardry or alchemy which he boldly described as "non-mathematical," based on his examination of "half a dozen" similar houses. Appx. Vol. 1, p. 642; *see also* Appx. Vol. 4, p. 4503-4505. More of Petitioners' experts' failures are discussed *infra.*

Petitioners also contacted Respondent Gebhardt's construction expert, Phil Huffner, during litigation, and attempted to use him as an expert for Petitioners. This occurred after Huffner had lunch with Petitioners' expert, Martin Maness and allegedly offered information to Maness that was supposedly beneficial to Petitioners' case. Appx. Vol. 4, pp. 4084, 4119. The lower court was very "uncomfortable" with this interaction, and found it "difficult to fathom that Mr. Huffner

[2] The conduction of mold tests without Respondents is particularly troubling, as Petitioners' "mold expert" is not formally educated in this highly technical discipline.

conveyed absolutely no information that was confidential or privileged to Plaintiffs' counsel." Appx. Vol. 1, p. 24, ¶¶ 1, 3.

Finally, on November 8, 2016, Petitioners served a subpoena on Respondent Gebhardt a week before trial demanding that he produce information not previously produced, on the first day of trial, without notifying Gebhardt's attorneys. The subpoena also confusingly directed Gebhardt to deliver those receipts in both Ohio and Marshall County. Appx. Vol. 2, p. 1925. The lower court found this to be "egregious conduct," as Petitioners' counsel did not mention any outstanding discovery at the pretrial hearing four days earlier, and Petitioners had already been warned about not issuing proper notice to Respondents. Appx. Vol. 1, p. 25.

An evidentiary hearing was held November 15, 2016. After hearing testimony from both Petitioners and Respondent Gebhardt, and after Petitioners stated repeatedly on the record that they conducted various tests and destroyed various evidence without notice and with the express purpose of helping their litigation against Respondents, the Court dismissed the case as a sanction against both Petitioners and Petitioners' counsel. Appx. Vol. 1, pp 26-27.

II. SUMMARY OF ARGUMENT

The circuit court was right, and was within its rights, to dismiss this case as a sanction for litigation misconduct against both Robert Gebhardt and Michael Coyne/Triple S&D. The court found that Petitioners and their attorney committed multiple acts of litigation misconduct. The Court followed the steps of the *Bartles* test, described *infra*, and determined that Petitioners were guilty of destroying or altering evidence, filing "untruthful and inaccurate" expert disclosures and expert testimony, and engaging in dodgy and questionable legal gamesmanship. Appx. Vol. 1, 7 – 18.

The Court found Plaintiffs' actions as a whole to constitute a "pattern of misconduct by Plaintiffs and their counsel that undermines the judicial process, impedes the fair administration of justice, and deprives Defendants of their right to a fair trial in this matter." Appx. Vol. 2, 19. The Court further found that Plaintiffs, and Plaintiffs' counsel, acted knowingly, willfully, and intentionally to manipulate and spoilate evidence, misrepresent expert testimony, and improperly contact Defendant Gebhardt and his retained expert. Appx. Vol. 1, 18 – 26.

The Court properly followed the necessary legal requirements, gave specific explanations and examples of each incidence of misconduct by Petitioners and their counsel, and clearly explained that based on the totality of the circumstances, it believed that both the Petitioners and their counsel engaged in willful and intentional behavior which damaged the judicial process in this matter beyond repair, justifying dismissal of this action. As the lower court's order and the record supports said dismissal, there is no compelling reason for this Court to find error on the part of the Court, let alone an "abuse of discretion" that would justify overturning its dismissal of the entire matter.

Additionally, Petitioner's entire argument specifically relating to Respondents Coyne and Triple S&D, Inc. (hereafter "Coyne") appears to be that since Coyne's counsel did not take a position on Gebhardt's Motion to Dismiss, the Court somehow should have allowed the matter to proceed despite the fact that Coyne was a party to the case just like Gebhardt; would use the same pool of tainted evidence, just like Gebhardt; would have to deal with the same "experts" as Gebhardt; and was otherwise prejudiced by Petitioners' attempt to win the case at the cost of integrity to the system. This prejudiced all defendants and mandated dismissal. Petitioners do not support their theory that it is acceptable to proceed with corrupted evidence against a tertiary defendant with any statute, case law, or legal treatise. Instead, Petitioners seem to believe that breathlessly arguing unsupported assumptions in the Brief are enough to overturn the lower court's

decision. Respondent Coyne respectfully disagrees and asks that the lower court decision be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The lower court's decision dismissing this case as a sanction against Petitioners is fully supported by the facts and controlling case law. Appellants do not raise any new issues meriting this Court's attention. Pursuant to W. Va. R. App. P. 18(a), the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Further, in Respondents' opinion, this case does not meet any of the requirements for a W. Va. R. App. P. 19 or 20 argument. There is, therefore, no need for oral argument in this case, which should be affirmed by Memorandum Decision. Should the Court permit oral argument, Respondent requests the opportunity to be heard.

IV. STANDARD OF REVIEW

This Court applies an abuse of discretion standard to the imposition of sanctions by the lower court. *State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders*, 226 W. Va. 103, 110, 697 S.E.2d 139, 146 (2010), *Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) ("'A primary aspect of . . . [a trial court's] discretion is the ability to fashion an *appropriate* sanction for conduct which abuses the judicial process.'" (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45) (internal citations omitted)).

V. ARGUMENT

Petitioners state only one actual "assignment of error" in their brief, alleging that the question before this Court is:

> Whether the trial court abused its discretion in granting Respondent Gebhardt's Motion to Dismiss as a sanction for serious litigation misconduct and spoliation of evidence by Petitioners and Petitioners' counsel and dismissing the case against not

only Respondent Gebhardt but also Respondents Michael Coyne and Triple S&D, Inc., who took no position on the Motion to Dismiss.

Pet'rs' Brief, "Assignments of Error," p. 1. This lone assignment of error is significantly different than the series of alleged errors set forth in Petitioners' initial Notice of Appeal, and also does not correspond with the list of alleged "abuses of discretion" alleged in Petitioners' Summary of Argument. Pet'rs' Brief, "Summary of Argument," p. 6. By rule, Respondent's Brief "must specifically respond to each *assignment of error*, to the fullest extent possible." W. Va. R. App. P. 10(b) (emphasis added). As it is unclear as to what alleged "errors" Petitioners are actually claiming, Respondent will attempt to respond to the actual assignment of error, and address Petitioners' issues in the "Summary of Argument" to the best extent possible.

a. The lower court followed proper legal procedure in dismissing the case as a sanction for litigation misconduct and spoliation of evidence under its inherent powers.

i. Courts have the inherent power to control their own docket independent of any specific statute or rule.

Courts are vested with the inherent power to control their own docket; "[a] court 'has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.' 14 Am. Juris., Courts, section 171." Syl. Pt. 3, *Shields v. Romine*, 122 W. Va. 639, 13 S.E.2d 16 (1940). As part of that power, the lower court has the ability to sanction attorney or party misconduct and to enter a default judgment. *State ex. rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 223 W. Va. 103, 113, 697 S.E.2d 139 (2010); *see also Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1474-1475 (D.C.Cir.1995).

The West Virginia Supreme Court explicitly held in *Richmond* that:

> [I]mposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.

Id. at 113, S.E.2d at 149.

To determine whether a sanction of dismissal or default judgment is appropriate, the trial court must follow the test set forth in *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996), as follows:

> Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

Id. at 384, S.E.2d at 830 (1996).

When reviewing the trial court's decision, the Supreme Court must "first examin[e] whether the sanctioning conduct identified the wrongful conduct with clear explanation on the record of why it decided a sanction was appropriate." *Richmond* at 114, S.E.2d at 149; *summarizing Bartles* at 384, S.E.2d at 830. It must then determine whether the sanction imposed "fits the seriousness of the identified conduct in light of the impact the conduct had in the case and the administration of justice, any mitigating circumstances, and with due consideration given to whether the conduct was an isolated occurrence or a pattern of wrongdoing." *Id.* Here, the lower court found, with sound reasoning based on the entire case, as well as a specific evidentiary hearing, that the Petitioners committed such wrongdoing and specifically pointed each instance of said wrongdoing out in its Order, as mandated by *Bartles* and *Richmond.* It also found that the totality of the evidence required the dismissal of Petitioners' case. Importantly, the lower court found that the conduct at issue affected "the case," not just Gebhardt individually. There is no law that would support a conclusion that corrupted evidence and untruthful expert disclosures which prejudice multiple parties are somehow cleansed by a finding that some of the affected parties did

not move for sanctions themselves. To hold otherwise would encourage mayhem in the litigation process.

The lower court followed the letter and the intent of the law, and there is no compelling reason for this Court to set aside the lower court's decision.

ii. Petitioners have confused discovery-based sanctions under W. Va. R. Civ. P. 37 with the Court's inherent power to issue sanctions, and Petitioners are not guaranteed, or deserving of, warnings for misconduct.

The *Richmond* Court specified that it had not "previously addressed whether and under what circumstances a court may impose a default judgment as a sanction pursuant to the 'inherent power [of a court] to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction,'" and that it was therefore a matter of first impression. *Richmond* at 111, S.E.2d at 147 (internal citations omitted). However, Petitioners supply, as part of their "Standards of Review," a series of pre-*Richmond* cases and various dicta from *Richmond* itself therein that are not actually part of the judicial review process in this matter. Pet'rs' Brief, "Standards of Review," p 8. The implication of Petitioners' carefully pruned citations is, essentially, that they were owed a warning or a lesser sanction before the lower Court dismissed their case.

Petitioners' argument that a warning or lesser sanction is only implied never actually developed by Petitioners. Perhaps this is because such an argument is not actually supported by the plain text of *Richmond*, nor is the language in those decisions seemingly mandating that the circuit court warn of impending dismissal sanctions targeted at proceedings like the ones at issue in this matter.

No part of *Richmond* states that a circuit court must warn of upcoming sanctions to use its inherent sanctioning authority. Rather, the *Richmond* court specifically sets forth the court's powers and responsibilities:

> The inherent power of courts to sanction also provides courts with a means to impose sanctions fashioned to address unique problems which may not be addressed within the rules. Following this reasoning we find that the inherent power of courts to sanction misconduct includes the authority to enter default judgment orders in appropriate circumstances.

Id. at 112, S.E.2d at 148.

As above, all that is required of the lower court is that it produce findings which "adequately demonstrate and establish willfulness, bad faith or fault of the offending party." *Id.* at 113, S.E.2d at 149.

> [I]mposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.

Accordingly, all that the lower court is required to do is "adequately demonstrate and establish willfulness, bad faith, or fault of the offending party." Petitioner cites, via discussion in *Richmond, Doulamis v. Alpine Lake Prop. Owners Ass'n, Inc.*, 184 W. Va. 107, 112, 399 S.E.2d 689, 694 (1990), for the argument that dismissal should only be used "after other sanctions have failed to bring about compliance." *Richmond* at 139, S.E.2d at 149. There are myriad problems with this citation. Most obviously, Petitioners' disagreement with the lower court over the severity of the conduct, or their claim to some right to a warning, does not meet Petitioners' burden to show the lower court abused its discretion in dismissing the case.

First, Petitioners *were* warned, repeatedly, about spoliation issues. Petitioners' water intrusion tests were barred. Appx. Vol. 1, p. 112. Petitioners' removal of brick triggered a probable

adverse jury instruction. Appx. Vol. 1, p. 100. Petitioners had expert witness testimony excluded for inaccuracy or failure to conform with expert disclosure numerous times. The court deferred ruling on other specific spoliation-based sanctions pending the trial. Appx. Vol. 1, pp. 12-15; *see, e.g.,* Appx. Vol. 1, pp. 85, 87, 89, 92, 102, 105, and 114. Defendants filed a plethora of dispositive motions to strike, for summary judgment, for dismissal, and, most importantly, for sanctions. *See, e.g.*, Appx. Vols. 1 and 2. Conversations like the following took place:

MR. KASSERMAN: We can schedule that however -- really, if we're going to look at the house, and I have been admonished by the Court for busting up my wee little portion, a 2-foot-by-2-foot area -- um -- that has really good evidence, and no one has -- no expert has said that's bad evidence, or that anything that was taken out. What's left is what you can see that hasn't been demolished, and if you hadn't -- if we hadn't done that, then the negligence would have been --

THE COURT: All you have to do is give them notice.

MR. KASSERMAN: -- covered over.

THE COURT: You had a pending lawsuit. You're going to do that, just give them notice. You can do that.

MR. KASSERMAN: I -- I made a mistake.

THE COURT: All right. All right. I'll be in touch.

Appx. Vol. 2, p. 2270.

Moreover, Plaintiff's apparent reliance on *Doulamis* is misplaced. *Doulamis* is a case about failure to respond to discovery requests pursuant to W. Va. R. Civ. P. 37, not the inherent sanctioning power of the circuit court. There were also mitigating circumstances in that matter due to a delay in Doulamis' ability to acquire medical records from the U.S. Army or the Veteran's Administration. *Doulamis* at 112, S.E.2d at 694. The facts of this case are not remotely comparable with the instant case. There is no allegation of witness tampering, party intimidation, improper communication, evidence tampering, or submission of improper experts in *Doulamis.* As the

Doulamis holding is not factually or legally relevant to the circuit court's decision in this matter, it is not part of the "standard of review" in this matter and must be ignored.

Similarly, *Mills v. Davis*, 211 W. Va. 569, 576, 567 S.E.2d 285, 292 (2002), is also a W. Va. R. Civ. P. 37 dismissal case, not one where sanctions are administered through the inherent power of the Court. In *Mills*, the plaintiff missed his IME appointment. Defendants failed to move to compel and therefore did not meet the requirements for W. Va. R. Civ. P. 37. The facts of *Mills* do not compare to the facts of this case, and the law deals with a different type of sanction. *Mills* is similarly not relevant to the instant case.

More apropos to the instant case, though still a W. Va. R. Civ. P. 37 case, is *Woolwine v. Raleigh General Hosp.*, 194 W. Va. 322, 460 S.E.2d 457 (1995). There, the Court explained that even though discovery sanctions generally require a warning, the court "characterize[d] Appellant's counsel's egregious pattern of neglect as an exception to the rule," and upheld a dismissal sanction. Notably, in *Woolwine*, the plaintiff "merely" failed to participate in discovery because he was dilatory with discovery and expert witness disclosures, and failed to comply with an order of the court. *Id.* at 325-327, S.E.2d at 460-462. Here, the lower court found that Petitioners, and Petitioners' counsel, "acted knowingly, willfully, and intentionally," and that "Plaintiffs have actively engaged in manipulation and spoliation of evidence in this matter." Appx. Vol. 1, p. 27, ¶ 1. *See also Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56, 602 S.E.2d 499 (2004) (striking all defenses and granting summary judgment to Kocher, without a warning).

While *Richmond*, to some extent, was an issue of first impression for this Court, federal courts are quite clear on the lower court's ability to levy dismissal as a sanction. "[W]e recognize here that when a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process, the court has

the inherent power to dismiss the action." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993). The United States Supreme Court has explained clearly that applying the Rules of Civil Procedure, and their appurtenant requirements, to the use of a court's inherent powers is incorrect:

> Much of the bad-faith conduct by Chambers, however, was beyond the reach of the Rules; his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address. **In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation,** which is contrary to the aim of the Rules themselves.
>
> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50–51 (1991) (emphasis added).[3]

In the matter *sub judice*, the lower court was in no way required to apply *ad hoc* court-fashioned rules akin to W. Va. R. Civ. P. 37 discovery violations to sanction conduct under its inherent powers. Here, Petitioners admitted to conduct deemed to be spoliation of evidence by watering their home's foundation, destructing brick, blocking their own away drain (and then removing the blockage), and performing bannister and mold tests without consulting any Respondent or Respondent's counsel. The Court also found that Petitioners and their attorney filed "untruthful and inaccurate" expert disclosures, improperly recorded Respondent Gebhardt,

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[3] Federal courts are generally required to consider the following factors when invoking inherent powers: (1) the degree of the wrongdoer's culpability; (2) the extent of the client's blameworthiness if the wrongful conduct is committed by its attorney, recognizing that we seldom dismiss claims against blameless clients; (3) the prejudice to the judicial process and the administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, and deterring similar conduct in the future; and (6) the public interest. *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462–63 (4th Cir. 1993).

Here, the lower court, though it only had to meet the *Richmond* standard and, somewhat obviously, was not bound by federal law, specifically explained that Plaintiffs and Plaintiffs' counsel were both culpable in this matter, that the totality of their activities prejudiced Defendants and the judicial process, and that other sanctions were not necessary. The lower court went above and beyond the *Richmond* and *Bartles* requirements in dismissing this action.

improperly communicated with Respondent Gebhardt's witness, and improperly contacted Respondent Gebhardt through a third party without notice to Gebhardt's counsel. *See generally* Appx., Vol. 1, pp. 1-27.

The sheer volume and diversity of misconduct in this matter makes Petitioners' insinuations that they were somehow owed warnings, lesser sanctions, or other precursors to sanctioned dismissal is unreasonable and unsupported by any rule. The lower court had no obligation under *Richmond* to, for example, issue warnings, exclude evidence, issue a series of adverse instructions to the jury, micromanage irrelevant or incorrect deposition testimony, or otherwise engage in absurd amounts of case remediation to permit Petitioners to proceed to trial despite the Court's findings. Any implication by Petitioners, through unadorned block citations or otherwise, that such remediation was necessary before dismissal is outside the scope of any requirement set forth by this Court in *Richmond.*

Lastly, Petitioners seem to be advancing the argument that if all the conduct leading up to the inappropriate conduct with Gebhardt on the eve of trial was not enough to warrant a dismissal sanction, the inappropriate conduct with Gebhardt was not enough to trigger the dismissal sanctions. This is also incorrect. Petitioners were sanctioned for the totality, volume and diversity of misconduct in this matter. There is no test that micromanages the judge's application of the scales of justice and assigns arbitrary weights to each sliver of inappropriate legal conduct. Rather, the dismissal sanctions were imposed on Petitioners based on the "totality of litigation misconduct." *Richmond* at 113, S.E.2d at 149, Appx. Vol. 1, p. 19, ¶ 1. This Court must determine whether the Circuit Court's imposition of dismissal sanctions was an abuse of discretion. Respondents contend that it is not, and that the lower court clearly followed the guidance given by this Court in *Richmond.*

b. The lower court correctly dismissed this case against both defendants for repeated willful litigation misconduct.

The lower court explicitly stated, in dismissing this matter, that:

> Each of these actions in and of themselves would not necessarily give rise to the imposition of sanctions. In fact, to date, the Court has declined to impose sanctions for some of the individual conduct listed above. **However, taken as a whole, Plaintiff's actions demonstrate a pattern of misconduct by Plaintiffs and their counsel that undermines the judicial process, impedes the fair administration of justice, and deprives Defendants of their right to a fair trial in this matter.**

Appx. Vol. 1 at 19. (emphasis added). As above, Petitioners admitted, during the Nov. 15, 2016 Evidentiary Hearing, to spoliation of evidence by watering their home, destructing brick, blocking their own away drain (and then removing the blockage), and performing bannister and mold tests without consulting any Respondent or Respondent's counsel. *See generally* Evid. Hearing. Trans., Appx. Vol. 1, p. 2308 – 2348 (Ms. Smith's testimony), 2349 – 2391 (Mr. Smith's testimony). The lower court also found that Petitioner filed "untruthful and inaccurate" expert reports and disclosures, as well as improperly communicating with Gebhardt's expert witness and Gebhart himself through a third party process server. *See, e.g.,* Appx. Vol. 1, p. 7-27, Appx. Vol. 1, p. 2424 - 2430.

None of these actions are acceptable individually, let alone as part of the same case. Specifically, the spoliation of significant and meaningful evidence, as well as Petitioners' introduction of untruthful and inaccurate expert reports and disclosures, constituted grounds for dismissal under W. Va. R. Civ. P. 37. As a whole, however, they clearly constitute disrespect for the judicial process, and dismissal as a sanction was proper. There are few cases with this many issues with spoliation, disqualified experts, and assorted detritus on any record, but in the few that exist, courts have found dismissal sanctions appropriate.

For example, in *Gratton v. Great American Communications*, 178 F.3d 1373 (11th Cir. 1999), the plaintiff claimed to have "four to six" secretly recorded tapes of the incidents in question. *Id.* at 1375. When asked to produce those tapes, he only produced two, and claimed he could not find more. *Id.* The court there, much like the court here, chose not to dismiss the case at that time. *Id.* After more discovery violations, including failing to produce those tapes, the court finally ordered dismissal as a sanction, which was upheld by the Eleventh Circuit Court of Appeals. *Id.* Notably, there was no discussion about the fact that prior sanctioned conduct did not result in a dismissal. *See also Woolwine v. Raleigh General Hosp.*, 194 W. Va. 322, 460 S.E.2d 457 (1995), *supra.*

i. Petitioners' repeated spoliation of evidence was clearly improper and constituted grounds for dismissal.

Nowhere in Petitioners' brief do they, or their counsel, deny destroying or altering evidence in any of the ways described by the Court in its dismissal order. Nor do they deny their failure to give notice of each instance of spoliation. Instead, Petitioners attempt to offer this court mitigating reasons why spoliation of four discrete areas of their home, which they knew to be evidence, without notice to Respondents, was legally acceptable. It was not, and it deprived Respondents of the ability to have a jury view, to observe the testing "methodology," or to otherwise examine the property after the initial examination.

It is undisputed that spoliation of evidence is, by itself, conduct sanctionable by dismissal. "Under the spoilation of evidence doctrine, '[w]here evidence is destroyed, sanctions may be appropriate, including the outright dismissal of claims, the exclusion of countervailing evidence, or a jury instruction on the 'spoilation inference,' ... [which] 'permits the jury to assume that 'the destroyed evidence would have been unfavorable to the position of the offending party.'" *New Jersey Manufacturers Ins. Co. v. Hearth & Home Techs., Inc.*, No. 3:06-CV-2234, 2008 WL

2571227, at *6 (M.D. Pa. June 25, 2008) (quoting *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 78 (3d Cir.1994)); *see also* Franklin D. Cleckley, Robin Jean Davis, and Luis J. Palmer, Jr, *Litigation Handbook on West Virginia Rules of Civil Procedure*, Rule 37 § 37(d) (4th ed. 2012) ("[A] trial court has discretion to sanction the offending party [for spoliation of evidence] by an outright dismissal of claims, or the exclusion of countervailing evidence.")

The elements of intentional spoliation are:

> (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages.

Williams v. Werner Enterprises, Inc., 235 W. Va. 32, 770 S.E.2d 532 (2015). All of these factors are present in all four discrete areas described by Petitioners and the lower court. Petitioners knew, and admitted, that they were altering portions of the house. Petitioners knew, and admitted, that they took actions that impacted evidence in the case strictly for litigation purposes in four discrete instances in this matter. Both Respondents pointed out that they could no longer inspect the property. Respondent Gebhardt filed a Motion to Dismiss the case on spoliation alone. Appx. Vol. 1, p. 1046. Respondent Coyne specifically filed a Motion *in Limine* to exclude all the evidence relating to mold testing, destructive testing of the bricks, and the infamous "water hose test." Appx. Vol. 1, p. 602-605. Even ignoring, for a moment, Petitioners' conduct as it relates to submitting "untruthful and inaccurate" expert disclosures, contacting Respondent Gebhardt's witness, and as it relates to serving a trial subpoena on Gebhardt, the trial court would not have committed reversible error if it chose to dismiss this case for spoliation issues alone.

The following summary of the evidence manipulation is provided to give context to the impact of the Petitioners' conduct on the Respondents' dwindling ability to use evidence in the case to defend itself.

A. The "Orange Paint" Test

The basement was spray-painted with orange lines, including spray-painted lines and arrows, by Petitioner's expert Jake Lammott, in order to depict the results of a radar test to determine whether the walls were "solid concrete." This is particularly important to Respondent Coyne as porosity of the basement wall is a central issue to a water intrusion claim, particularly when Petitioners are claiming that a very small brick veneer wall is causing their basement to fill with water. It is undisputed that the basement was spray-painted orange during litigation. Petitioners testified that it was done for the purpose of proving a case against Respondents, and was not done to mitigate any damages. Appx. Vol. 2, p. 2320. Respondents Gebhardt and Coyne were never notified of this test. Petitioners admitted the same at the Evidentiary Hearing. Appx. Vol. 2, p. 2348. Petitioner believes that the fact Defendant Gebhardt was allowed to take pictures of the site during an informal inspection before the orange paint somehow cures this problem. It does not. Most obviously, Coyne was not given the opportunity to inspect it at all. It is an undisputed fact that the basement walls were spray painted by Petitioner's own expert, without notifying Respondents. Pet'rs' Brief, p. 16. Petitioner could have notified the parties and the Court, scheduled a time at which the spray paint test was to occur, and the test could have been conducted in Respondents' presence. Petitioners instead chose not to follow procedure in an attempt to create a "gotcha" moment at deposition or trial. The Court correctly identified this as spoliation, which is sanctionable conduct in itself.

Nor is the orange spray paint trivial, as Petitioner implies. For one, it completely ruins Respondents' ability to have a jury view of the property. Despite Petitioner's claims that the court was "not inclined" to have a jury view, Respondent Coyne specifically requested a jury view at the October 16, 2015 Pretrial Conference. Hearing. Appx Vol. 2, p. 2247.[4] It also prevents Respondents from taking pictures of the house over time and forces them into using the pictures taken by Gebhardt's counsel informally when litigation began. In the end, however, the walls are irrevocably corrupted, and were done without notice to opposing counsel. Therefore, it was not an abuse of discretion for the Court to identify the water hose test issue as part of its support for sanctionable dismissal.

B. Intentional Watering of the Foundation

Petitioners claim against Respondent Coyne is that their house is leaking water through a small brick veneer wall. *See, e.g.,* Appx. Vol. 1, p. 137-138. Petitioners both admitted at the evidentiary hearing that they watered the corners of the house and caused water to enter the house. It is undisputed that this was done during litigation. It is further undisputed that it was done for the purpose of proving a case against Respondents, and was not done to mitigate any damages. Appx. Vol. 2, p. 2308-2309. The lower court excluded these "tests" from the trial. Appx. Vol. 1, pg. 112.

As with the "orange paint" incident, Petitioners did not notify Gebhardt or Coyne of the tests being conducted. Respondent Coyne explained, in his Motion *in Limine* to exclude the "water test," that Respondents "have no idea how much water was sprayed on the house, where it was, what water pressure, for what period of time, and where water seemed to be coming in. Further, there was no moisture reading taken before, during, or after," and that "the Defendants were not

[4] Partial pictures of the newly-orange basement can be found at Appx. Vol. 6, p. 6640, 6642, 6650, and 6652.

invited to this testing and therefore have no way to cross-examine the Plaintiff as to how or why she was doing the things she was doing." Appx. Vol. 1, pp. 597-598.

Once again, Petitioners do not allege that spoliation did not occur or that the evidence was not altered or damaged. In fact, Petitioners confirm that they intended to file a lawsuit when they watered the corners of the house - Ms. Smith testified that her attorney was "on-board" with the testing. Appx. Vol. 2, p. 2308, *supra*. Instead, they allege that the lower court "failed to consider" that Petitioner allegedly took pictures of the "water staining on the walls" before administering the tests, because "natural conditions" caused the walls to get wet anyways, and because "watering the walls" is allegedly a "proper test" to determine wall leakage. Pet'rs' Brief, p. 22

Once again, Petitioners miss the point. Apparently lost to Petitioners is the fact that Respondents have no way of knowing how much water was run on the walls, in what quantities, pressures, or anything else about the test. They have no way of knowing if the pictures submitted by Petitioners were taken before or after Ms. Smith conducted repeated water tests on the premises. They have no way of knowing essentially anything about where and why the damage to the walls occurred other than Petitioners' own explanation.

This unauthorized testing is particularly detrimental to Coyne. As Coyne explained in its Motion *in Limine*, "the Plaintiffs are attempting to utilize the outcome of this test or its outcome to prove that the brick veneer is installed inappropriately and/or that the brick walls are installed inappropriately." Appx. Vol. 1, p. 598. As a result of Petitioners' pre-suit spoliation of evidence, Coyne never had an opportunity to examine the walls in the state that, at least allegedly, caused Petitioners to file a lawsuit; by the time the lawsuit was filed, the walls had already been tampered with. Petitioners' argument that the water hose tests should not have been considered as

sanctionable conduct does not, in fact, "hold water." Therefore, it was not an abuse of discretion for the Court to identify the water hose test issue as part of its support for sanctionable dismissal.

C. Removal of the Brick Exterior

Once again, Petitioners testified that they removed brick from the side of their house, that they removed it during litigation, that Respondents were not notified of the brick's removal, and that the brick was at issue in this matter. Appx. Vol. 2, p. 2313-2314, 2358-2360. Once again, it is undisputed that spoliation of evidence occurred. Once again, Petitioners were warned about spoliation and failure to notify Respondents before manipulating evidence; Petitioners received a potential adverse jury instruction for spoliation of evidence for dismantling the veneer. Appx. Vol. 1, p. 100. Petitioner's primary argument to mitigate this spoliation is that Respondent Gebhardt's expert was able to examine the wall and take pictures of it before this occurred. Pet'rs' Brief, p. 23, ¶¶ 6-7. However, Petitioners never address the impact of the destruction of the brick wall to *Respondent Coyne*.

Petitioners unequivocally knew that the brick wall was crucial to any litigation against Respondent Coyne; in fact, Petitioners specify that "based on the unequivocal evidence that the brick removal revealed, the decision was made to add [Coyne] as a defendant." Pet'rs' Brief, p. 25, ¶ 2. Coyne never had a chance to have an expert present to examine the brick, and crucial information was lost and/or destroyed. As Coyne explained in his Motion *in Limine* Regarding Spoilation of Evidence:

> Plaintiff seems to believe that water is entering her home through a brick veneer. If that were true, the [Tyvek] house wrap behind the brick veneer as well as the OSB wall material and the framing members should therefore be showing signs of rot, moisture, and so forth . . . [Plaintiff] used some indeterminate tool to remove the bricks and open up a wall cavity. No one was ready with a moisture meter to document the interior conditions and those conditions are now forever changed. No one did any testing of the underlayment or the wood material to determine whether or not degradation because of water had occurred. In other words, a wonderful

> opportunity to essentially exculpate this Defendant from all liability has gone. This is spoliation and destruction of evidence in the worst way.

Appx. Vol. 1, p. 604, ¶ 1. Petitioners believe, once again, that this critical evidentiary issue was not appropriate for the Court to consider as part of its dismissal sanction because they submitted pictures to Respondents. Pet'rs' Brief, p. 25, ¶ 3. Petitioners even compare it to a DNA examination, claiming that "*as long as there is an adequate sample of DNA available for the accused to test*, there is no prejudice to overturn a conviction." Pet'rs' Brief, p. 26, ¶ 2. Putting aside the myriad of differences between DNA tests in criminal cases and spoliation of evidence claims in civil construction cases, what Petitioners fail to grasp is that there is no longer an "adequate sample" available, because the moisture has changed irrevocably and water has been running through the hole in the wall for years now. Additionally, Respondents cannot walk the jury around the home to show Respondents' high quality workmanship because there is now a hole in the side of the house. Therefore, it was not an abuse of discretion for the Court to identify the spoliation of the brick wall as part of its support for sanctionable dismissal.

D. Blocking the Away Drain

Petitioners once again testified that they placed a screen over the away drain for the French drain system in the home. Pet'rs' Brief, p. 26, ¶ 4. They also testified that they, on the advice of their counsel, removed that screen after the conclusion of Gebhart's deposition, when he stated that blockage of that drain was causing the water to back up into the home. Appx. Vol. 2, p. 2311, 34:5 – 34:16; Pet'rs' Brief, p. 27, ¶¶ 4-5. Petitioners testified that they did so during litigation without notice to either Respondent or their counsel. Appx. Vol. 2, p. 2355, 78:11 – 78:23.

As noted by the Court, Petitioners' own expert, Alan Baker, explained that it was "unreasonable" for Plaintiffs to block their foundation drain pipe, and that blocking that pipe would

"suggest that Plaintiffs intended to get water in their basement." Appx. Vol. 1, p. 10, ¶ 2; *see also* Appx. Vol. 2, p. 4294, 14:7 – 14:17.

Petitioners' primary argument against Coyne is that the brick installation was faulty and therefore allowed water into the house. Petitioners then specifically removed an object that would show an alternate theory of the case, *i.e.*, that the water was backing up into the drain, without Coyne, Gebhardt, or a representative being present. It is possible that previously trapped water came gushing out when the drain was removed. It is also possible that nothing meaningful happened. The outcome is irrelevant. No one other than Petitioners witnessed the removal of the screen, and no one can testify to its effect. The screen is no longer present for a jury to examine, or for a party's expert to examine again as the real reason water was coming into their basement. Therefore, it was not an abuse of discretion for the Court to identify the spoliation of the brick wall as part of its support for sanctionable dismissal.

E. Disassembling the Bannister

Similar to the above events, Petitioners disassembled the bannister inside the house, that they did so during litigation, that Respondents were not notified of the disassembly or of the "test" conducted by Petitioners afterwards, and Petitioners and their attorney did so to prove their case against Respondents. Appx. Vol. 2, p. 2316, 39:8 – 39:22.

Petitioners believe that because they noticed the other parties to conduct a similar test *after* disassembling evidence, that their disassembly of evidence is not sanctionable conduct. This is, as before, incorrect. The court, once again, was forced to exclude the bannister measurements and was considering an adverse jury instruction at the time this matter was dismissed. Contrary to Plaintiffs' beliefs, the court had every reason to include the bannister tampering instruction as part of the court's dismissal sanction. It goes without saying that it was not an abuse of discretion for

the Court to identify the spoliation of the brick wall as part of its rationale for dismissal as a sanction.

F. Performing Mold Tests

Finally, Petitioners and their "expert," John Gongola,[5] conducted "mold tests" during litigation without notifying the Court or Respondents' counsel during the pendency of the litigation. The test required Gongola to drill holes in the wall. Pet'r's Brief, p. 32, ¶ 1-2. Importantly, Gongola also failed to record the moisture meter readings from the test, and did not preserve the air samples. Appx. Vol. 1, p. 12. The court found that the testing "was improper and potentially prejudicial," but did not find any actual prejudice in the conduct at the time. Appx. Vol. 1, p. 125. Petitioner believes that this finding precluded the lower court from identifying this conduct in its dismissal sanction. Pet'r's Brief, p. 32, ¶ 2-3. This is also incorrect. As usual, Petitioner was on notice that its conduct was "potentially prejudicial," and that its behavior was improper. Appx. Vol. 1, p. 125. As above, the lower court was within its power to consider the mold tests when formulating its dismissal sanction. *Richmond* at 111, S.E.2d at 147 ("since no identifiable rule or statute governs the entire pattern of litigation misconduct for which sanctions could be imposed that the sanctions were imposed as an exercise of the inherent power of the court.")

The lower court could have found that Petitioners' repeated spoliation of evidence, despite their excuses for doing so, was, by itself, sanctionable by dismissal. It did not, though said spoliation was undoubtedly a large part of its decisionmaking process. The lower court's reluctance to issue said sanction, in accordance with this Court's admonishment that such sanctions

[5] Mr. Gongola's "expert" credentials were at issue repeatedly in this matter; he was subject to a series of motions from both Respondents. *See, respectively,* Appx. Vol. 1, pp 620, 633.

should be used sparingly, should not now be available to Petitioners as a shield to defend themselves against those sanctions now.

ii. Petitioners' "untruthful and inaccurate" expert disclosures are appropriate grounds for dismissal.

The lower court found, as part of its dismissal order, that Petitioners submitted "untruthful and inaccurate" expert disclosures. Petitioner takes offense at the Court's assertion, claiming, in part, that its various experts were disclosed for different reasons than those which the court found "untruthful." Pet'rs' Brief, p. 32, ¶ 5, p. 33, ¶¶ 1-2. Petitioner does not defend Martin Maness or Alan Baker, in its brief. The court specifically identified Martin Maness as offering "22 separate opinions," of which it excluded thirteen. Appx. Vol. 1, p. 21, ¶ 2. It also identified Alan Baker as offering "no less than 23 separate opinions," of which Baker disclamed 16 at his deposition, and "of the 7 remaining disclosed opinions, the Court excluded 5 of them." Appx. Vol. 1, p. 23, ¶ 1. Petitioners also do not defend Richard Darrow, who was supposedly going to give testimony that a new floor would cost "$12,952.00." Appx. Vol. 1, p. 316, ¶ 1. Darrow, however, admitted that that estimate was for an "unfinished, exotic wood flooring product," which drove up the price. Appx. Vol. 1, p. 785, ¶ 2.

However, it is important to note that Petitioners continually engaged in this sort of definitional pedantry, *i.e.*, attempting to have an expert with a fairly narrow scope of qualifications speculate about issues outside his scope of expertise, and then attempting to justify said speculation as *within* that expert's scope of expertise. The lower court correctly saw this, and struck portions of each expert's testimony as necessary. *See, e.g.,* Appx. Vol. 1, pp. 21-23.

For example, Petitioner now identifies Josh Emery as merely an "expert on cost of repairs, not causation." Pet'rs' Brief, p. 32, ¶ 5 (emphasis in original). However, Petitioner's actual disclosure indicates that Emery was intended to testify to "the ineffectiveness of the past June 20,

2012, proposal to effectively waterproof the Smiths' entire basement area." Appx. Vol. 1, p. 318, ¶ 1. This alleged "ineffectiveness" is not within the scope of an alleged "cost of repairs" expert. Petitioner also fails to mention that Emery initially gave Petitioners an estimate of $ 16,956.00 to waterproof the basement, which was also guaranteed, and Petitioners thereafter requested a second, more expensive proposal for $ 44,114.00, which did not have a warranty and which Mr. Emery did not recommend. Appx. Vol. 1, p. 21-22. This decision was obviously calculated to increase the "boardable" damages, not to find any sort of truth.

Similarly, John Gongola was initially disclosed as a mold expert. Pet'rs' Brief, p. 33, ¶ 1. He is qualified to test a location for mold, but not much else, as shown by Respondent Coyne. *See* Appx. Vol. 1, p. 633-648. However, Gongola also offered opinions far outside his scope of expertise. Perhaps the most egregious example is the fact that he offered an actual "non-mathematical" estimate of the cost of rebuilding the house to remediate, formulated by providing "a rounded figure based on the square footage of the home and the type of contamination and damage that I observed." Appx. Vol. 1, p. 642. Petitioners incredibly maintain that this "guesstimate" should not have been excluded. Appx. Vol. 1, p. 642, ¶ 3-4; Pet'rs' Brief, p. 33, ¶ 1. He also offered opinions on state building code violations, which he is unqualified to give. Appx. Vol. 1, p, 640, ¶ 2. The court justifiably excluded these opinions as outside his scope of expertise.

These expert disclosures were, as the court explains, difficult and vexatious for the Court and for Respondents to deal with, and "sent the Defendants on a costly and time-consuming wild goose chase in discovery." Appx. Vol. 1, p. 21, ¶ 1. The lower court was correct and within its discretion to consider the lack of truthful and accurate expert disclosures in its dismissal sanction.

iii. Petitioners' interactions with Defendant Gebhart's expert witness and Gebhardt himself are appropriate grounds for the lower court's dismissal sanction against both Respondents.

A. Respondent Coyne unequivocally agrees with the lower court's decision on these matters.

Petitioners engaged in three interactions which the Court found to be relevant to its sanctions; two with Respondent Gebhardt, and one with one of Respondent Gebhart's expert witnesses. Respondent Coyne was a sub-contractor for Gebhardt, and is therefore inextricably tied to all legal theories and evidence involving Gebhardt.

First, Petitioner's counsel recorded Respondent Gebhardt prior to filing a lawsuit against him, but before said lawsuit was filed, for the express purpose of preserving it "as potential cross-examination evidence of prior inconsistent statements." Pet'rs' Brief, p. 34, ¶ 4. While this is not *per se* illegal in West Virginia, the lower court found this to be "dishonorable," if "not illegal and not clearly unethical." Appx. Vol. 1, p. 23, ¶ 3. The court found that "Plaintiffs' conduct was deceitful, and that Plaintiffs and Plaintiffs' counsel misrepresented themselves to Gebhardt." *Id.*

Second, Petitioners communicated with, and retained, Gebhardt's expert Phil Huffner, after their own expert, Martin Maness, told Petitioners that Huffner called the house a "tear-down" during lunch. Pet'rs' Brief, p. 37, ¶ 5. The lower court found this to be an attempt by Petitioners to "obtain an unfair advantage over Gebhardt," and that "[i]t is difficult to fathom that Mr. Huffner conveyed absolutely no information that was confidential or privileged to Plaintiffs' counsel." Appx. Vol. 1, p. 24, ¶ 3.

Third, Petitioners sent a defective subpoena to Gebhart a week before trial without notice to Gebhart's counsel, demanding he produce gravel receipts. These receipts were, to Respondent Coyne's knowledge, not addressed in prior discovery. The lower court found that the subpoena "circumvented [Gebhart's] right to counsel," was "reckless," and that "he may have been induced to make statements and admissions to a person who could be called to testify at trial against him." Appx. Vol. 1, p. 26, ¶ 2.

None of these issues directly affect Respondent Coyne, and, accordingly, as Petitioner states repeatedly, Respondent Coyne did not join in motions regarding these issues. However, Respondent Coyne expressly agrees with the lower court's findings in these matters, and the attempts by Petitioners throughout their brief to insinuate otherwise based on Respondent Coyne's failure to join motions for sanctions related to these issues is without merit. *See, e.g.*, Pet'rs' Brief, p. 13, ¶ 2; p. 14, ¶ 1. Regarding improper conduct with Gebhart himself, the lower court correctly pointed out that in *Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56, 602 S.E.2d 499 (2004), when Oxford had improper communications with Kocher without his counsel present, the court struck all Oxford's defenses and granted judgment to Kocher. *Id.* at 59, S.E.2d at 502.

Lastly, Petitioners specifically mention Respondent Coyne's counsel's alleged opinion on Respondent Gebhardt's Motion for Sanctions as if it has some evidentiary value. It does not. Respondent Coyne's counsel is not an arbiter in this matter. Even if Mr. Kepple found Petitioners' actions towards Respondent Gebhart and his expert to be entirely legitimate and upstanding actions, his supposed opinion as alleged by Petitioners is meaningless to the pending action.

B. To the extent Petitioners are attempting to keep Coyne in the case alone, Coyne would be overwhelmingly prejudiced by such a decision.

Petitioners are attempting to argue that because Respondent Coyne did not join in the final Motion for Sanctions, that they should not be dismissed, such an argument must be ignored by this Court. First and foremost, the sanction of dismissal is a punishment for Petitioners. To permit them to proceed with their case punishes Coyne for Petitioner's wrongdoing, while allowing Petitioner to proceed with this matter. It also ignores the significant damage done to Coyne's case by removing Gebhardt and by extention Coyne's cross-claim against him. The lower court did not commit an abuse of discretion in dismissing this matter against Gebhardt, and it similarly did not do so in dismissing this matter against Gebhardt.

As explained throughout this Brief, Coyne was significantly harmed by the spoliation of the brick, the watering of the walls, and the clogging of the drain, even moreso than Gebhardt. As above, Coyne was not even a party to the case when the brick was removed, forever damaging Coyne's ability to measure the moisture inside the brick. Pet'rs' Brief, p. 25, ¶ 2. Coyne cannot conduct the jury view he planned on conducting because the house is painted orange. Essentially, Petitioners' entire case is predicated on the argument that the brick leaked water, and Petitioners have repeatedly wrecked Coyne's ability to prove otherwise via unsupervised "tests," as described above.

Further, as Respondent Coyne was a subcontractor of Gebhardt and there were a myriad of other potential causes of the alleged water leaks, Coyne has a pending counter-claim against Gebhardt. Appx. Vol. 1, p. 502-503. To dismiss Plaintiff's claims against Gebhart without dismissing those same claims against Coyne works an injustice on Coyne, as he would then be denied the possibility to recoup any losses from his erstwhile codefendant.

Coyne would additionally be left with the same pile of "evidence" in the home which the lower court has already ruled to be "not reflective" of Respondents' work. Appx. Vol. 1, p. 20, ¶ 3. Coyne would also be left with the same "untruthful and inaccurate" expert disclosures. Appx. Vol. 1, p. 21, ¶ 2. Coyne's actual presentation of his case is not significantly less prejudiced by Petitioners' actions than Gebhardt. Practically every piece of evidence against Coyne is corrupted.

VI. CONCLUSION

The lower court did not commit an abuse of discretion in this matter by dismissing this matter as a sanction under its inherent powers. This case was dismissed, in large part, because Petitioners "obliterated any delineation" between the original work done by Respondents and the subsequent "spoliation, manipulation, and alteration" done by Petitioners. Appx. Vol. 1, p. 20. The

lower court found that Petitioners destroyed and modified evidence without notice to Respondents, that Petitioners submitted a series of untruthful and inaccurate expert disclosures that prejudiced Respondents further, and that Petitioners committed a series of ethically questionable acts towards Mr. Gebhardt and his expert witness, which the lower court took as the last straw before deciding to dismiss the case against both Respondents as a sanction.

The lower court's findings are supported by the evidence in this matter, as described throughout this Brief. The lower court also held an evidentiary hearing, where Petitioners tightened the sanctions noose around their throats. The trial court's findings more than "adequately demonstrate and establish willfulness, bad faith or fault of the offending party" as required by *Richmond, supra.* As the lower court explained in its Order:

> Plaintiffs' repeated disregard for the notice requirements in this litigation, despite this Court's admonishments, demonstrated Plaintiffs' reckless disregard for proper judicial process. Plaintiffs were simply not deterred by the Court's prior Orders. Plaintiffs should have been cognizant of the possible ramifications of continuing to disregard notice to Defendants.

Appx. Vol. 1, p. 25. In short, there is no reason for this Court to overturn the lower court's procedurally and substantively justifiable decision to dismiss this case and control its own docket.

WHEREFORE, Respondents ask this Court to uphold the lower court's decision dismissing this matter against Respondents Gebhardt and Coyne due to Petitioners' sanctionable conduct, and for any and all other relief this Court deems appropriate.

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SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRI L. SMITH and KENNETH W. SMITH,	:
Plaintiffs Below, Petitioners,	:
	: Case No. 17-0806
v.	: (Ohio County Civil Action No. 13-C-323)
	:
ROBERT TODD GEBHARDT, MICHAEL	:
COYNE, and TRIPLE S&D, INC.,	:
Defendants Below, Respondents.	:

CERTIFICATE OF SERVICE

Service of the foregoing RESPONDENT MICHAEL COYNE AND TRIPLE S&D, INC.'S RESPONSE TO PETITIONERS APPEAL BRIEF was had upon the following by mailing a true and correct copy thereof by the United States Postal Service, postage prepaid, this 31st day of August, 2017:

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